No. 13,313

IN THE

United States Court of Appeals
For the Ninth Circuit

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., co-partners, doing business as Anderson & Son Transportation Co.,

Appellants,

vs.

A. E. OWENS, FERN OWENS, and R. F. OWENS, co-partners, doing business as Owens Brothers,

Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLANTS.

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BRIEF OF APPELLANTS.

I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This is an appeal taken by appellants (defendants in the lower Court) from a final judgment rendered on the 27th day of November, 1951, by the District Court for the Territory of Alaska, Third Division, in favor of appellees (plaintiffs in the lower Court) and

against the appellants (defendants in the lower Court).

The District Court for the Territory of Alaska is a Court of general jurisdiction consisting of four divisions of which the Third Division is one. Jurisdiction of the District Court is conferred by Title 48, United States Code, Section 101. See also Alaska Compiled Laws Annotated, 1949, 53-1-1. Procedure in the District Court since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure which were extended to the Courts of the Territory of Alaska on that date. See 63 Stat. 445. See also 48 United States Code 103A.

Jurisdiction of this Court to review the judgment of the District Court is conferred by new Title 28 United States Code, Section 1291 and 1294 and the appeal is governed by the Federal Rules of Civil Procedure.

This action was commenced by filing of plaintiffs' complaint on the 19th day of October, 1948 (R 3 to 8). The complaint is for damages on account of alleged breach of warranty by defendants-appellants in the sale of a certain motor vessel. Defendants' answer was filed on February 11, 1949 and such answer controverts the allegations of plaintiffs' complaint (R 8 to 13).

The case was tried by the District Court from March 9, 1951 through March 19, 1951 and after completion of the testimony, by stipulation of the parties and by order of the Court, depositions of Howard A.

Dent, Orville H. Mills and Ted Engstrom were taken on behalf of the plaintiffs and the deposition of David Eldon Erickson was taken on behalf of the defendants. Such depositions were submitted to the Court along with the other testimony (R 401-402, 405-468, 29-33). The witness Dent had previously testified by deposition which was used during the course of the trial (R 14-18).

The journal entries of the trial Court concerning the trial of this action are found at R 19-26.

The opinion of the trial Court is found at pages 34 through 41 of the record. Findings of fact and conclusions of law of the trial Court are found at pages 41 through 48 of the record. The judgment of the trial Court is found at pages 49 and 50 of the record.

II.

STATEMENT OF CASE.

On April 1 of 1947 at Seattle in the State of Washington appellants as sellers and appellees as buyers entered into a certain written agreement by the terms of which the sellers agreed to sell to the buyers and the buyers agreed to buy of and from the sellers a certain United States Army war surplus tug known as the TP 100 which at that time was located on Lake Union at Seattle, Washington. The written agreement executed by the parties was admitted in evidence by the trial Court as Plaintiff's Exhibit 1 and is found at pages 78 through 82 of the record.

The written agreement above mentioned was drawn by Mr. Mills of the firm of Chadwick, Chadwick and Mills of Seattle and Mr. Mills at that time was the attorney for the appellees, A. E. Owens, et al., doing business as Owens Brothers (R 76, 190, 305, 406). Appellants had no attorney in Seattle and were not represented in this matter by independent attorneys (R 305).

The TP 100 had been purchased by Jack C. Anderson, Jr., at army surplus sale through the War Surplus Agency at Fort Richardson, Anchorage, Alaska, sometime in the spring of 1946 and at the time of the purchase it was located in Resurrection Bay near Seward, Alaska (R 358). The vessel was built in the year 1944 (R 138) and cost new approximately $250,000.00 (R 266). At the time the vessel was purchased by appellant Jack C. Anderson, Jr. it had a burned out bearing which was repaired by appellants before the vessel was used (R 287, 359).

After the vessel was purchased by appellant Jack C. Anderson, Jr. it was used during the navigation season of 1946 on Cook Inlet, Alaska (R 286-287, 359). During that period it was necessary to "baby the one cylinder" as it was giving a little trouble but otherwise the engine operated satisfactorily (R 287, 359).

Appellant Jack C. Anderson, Sr., maintained a winter home in Seattle and about the 10th of February, 1947, left Seldovia, Alaska, with the TP 100 accompanied by the power barge Lois Anderson for

Seattle (R 287, 359). Prior to starting the trip to Seattle the piston in the cylinder which had been giving trouble was disconnected and "hung up" so that the motor operated on five cylinders during the trip to Seattle (R 233, 236, 288, 360).

During the trip from Seldovia, Alaska, to Seattle, commenced on or about February 10, 1947, the motor operated in a satisfactory manner and without trouble (R 236, 288). In the course of this trip to Seattle the vessel TP 100 during periods of fair weather towed the barge Lois Anderson for the reason that the tug was a faster vessel than the barge (R 234, 288, 289, 360).

On the trip to Seattle in February of 1947 the tug TP 100 hit a rock and backed off. Upon a preliminary inspection, no leaks appeared and the vessel proceeded on to Seattle (R 234, 236, 289, 291).

After arriving at Seattle the tug TP 100 was tied up at a dock on Lake Union and appellee A. E. Owens saw it there and made inquiry as to whether it was for sale and thereupon had certain discussions with appellants which culminated in the agreement to sell and to purchase (Plaintiffs' Exhibit 1 above mentioned). For Mr. Owens' version of the conversation leading up to the agreement, on direct examination, see the record, pages 73 and 74 and pages 113 and 114. See pages 122 and 123 of the record for the testimony of the witness Owens on cross-examination as to these conversations. The only other testimony offered by plaintiff as to the conversations leading up

to the agreement is in the two depositions of Mr. Dent. The first of such depositions was taken February 17, 1951, and is found at pages 14 through 18 of the record. The second deposition was taken on the 10th day of May, 1951, and is found at pages 29 through 33 of the record. This second deposition made reference to a letter dated March 12, 1949, written by the witness H. A. Dent to Mr. Mills, appellees' attorney, and that letter is found at pages 26 and 27 of the record.

For testimony on behalf of appellants as to the conversations leading up to the making of the written agreement of sale see the testimony of the witness George Henry Saindon called on behalf of the defendants found at pages 239 and 240 of the record on direct examination and at pages 243 and 245 on cross-examination. See also the testimony of appellant Jack C. Anderson, Sr., at pages 297, 298, 300, 301, 302, 303 and 304 on direct examination, and pages 321 and 322 on cross-examination. See also the testimony of Jack C. Anderson, Jr. on direct examination which appears at pages 363, 364, 366, 367 and 368. For cross-examination of this witness as to the conversations leading up to the signing of the agreement, see pages 380, 381.

Mr. Owens, the appellee, knew at the time he purchased the vessel in question that it was an army surplus boat (R 121) and that it had been running on five cylinders (R 122). The vessel was never represented as being a new vessel (R 128). Owens looked over the vessel on several occasions prior to

making the agreement to purchase the vessel and had ample opportunity to inspect the vessel for all that he could see (R 128).

After the agreement dated April 1, appellants at the request of appellees moved the boat under its own power from one portion of Lake Union to another portion of such lake and appellee A. E. Owens went along on the vessel when it was moved.

Appellee first caused the defective crank pin to be turned or honed at a cost of $300.00 and later decided to have an inspection made of the motor and upon such inspection decided to remove the crankshaft. While the date of this decision is indefinite, it apparently took place some time prior to April 29, 1947 (R 151, 155). Plaintiff may have had such inspection made some time prior to April 20, 1947 (R 226).

Two dates have been suggested as the time when the $5000.00 down payment was transferred to appellants, April 22, 1947 and May 20, 1947. The testimony of Mr. Owens was to the effect that the transfer was made May 20, 1947 (R 133), and later that it was April 22, 1947 (R 186). The latter statement is based upon a claim that the witness' memory was refreshed upon seeing the letter from his attorney directed to appellants and dated May 17, 1947 (R 186).

First notice of claimed misrepresentations or breaches of warranty was given to defendants in a letter dated May 17, 1947, written by Mr. Mills as attorney for appellees and directed to appellants and received by appellants after their arrival in Alaska

somewhere around the 10th of June, 1947. This letter is Defendants' Exhibit "B" and was answered by a letter from appellants to Owens, Plaintiffs' Exhibit 20, which in turn was followed by a letter from Mills as appellees' attorney to appellants dated July 24, 1947, Defendants' Exhibit C.

Appellants remained in Seattle in 1947 until the third day of June (R 334).

This action was commenced on the 19th day of October, 1948, and resulted in a judgment in favor of the plaintiffs (appellees here) for the sum of $24,978.86 plus costs and attorneys' fees (R 49).

During the course of the trial and at the close of plaintiffs' evidence defendants moved for judgment which was denied.

After entry of the judgment defendants took certain exceptions to the Court's findings of fact and conclusions of law and to the judgment rendered and also moved to amend the findings of fact and conclusions of law and for judgment in favor of the defendants or in the alternative for a new trial and all of these motions were overruled summarily by the Court on the ground that they had been submitted without argument (R 62).

III.

SUMMARY OF ARGUMENT.

Appellants believe that on the evidence which is before this Court there is no evidence to justify a judgment in favor of appellees and against appellants. In that connnection it is submitted that there was no express warranty contained in the written agreement of sale unless it be inferred from paragraph I thereof that the vessel was sold "as is where is". It is further contended by appellants that under the parol evidence rule evidence of oral conversations leading up to the execution of a written agreement are incompetent and inadmissible and that since all of the evidence concerning alleged warranties in this case rest on parol evidence that defendants' motion for judgment at the close of plaintiffs' case should have been granted.

Irrespective of the parol evidence rule appellants contend that giving plaintiffs' evidence the best effect to which it is entitled such evidence does not justify any finding that there was any warranty made or that any warranty was breached or that plaintiffs were entitled to any general damages or damages on account of delay and for that reason appellants believe that the judgment rendered against them by the trial Court should be reversed and that the District Court should be ordered to dismiss the action or to enter judgment in favor of appellants.

In the alternative and for the sake of argument, but without admitting that any damages are due from

appellants to appellees, appellants claim that plaintiffs did not prove any proper element of damages in that their evidence was based upon a claim of damages because of alleged repairs made to the boat and not upon the correct measure of damages as to the difference of value of the boat between the condition of the boat as it was sold and the value of the boat had it been as warranted.

Appellants further contend that in the event any damages were justified in favor of plaintiffs and against defendants that the damages attempted to be proved are wholly speculative and do not justify a judgment for more than a small portion of the judgment granted by the trial Court. Appellants further contend that the item allowed for loss of profits is not a legal element of damages in the light of the record in this case and that in any event such element of damages as it was attempted to be proved is purely speculative and that the evidence is not sufficient to support a judgment in favor of appellees and against appellants on that point.

IV.

ARGUMENT.

Plaintiffs' complaint in this action alleged in paragraph III that defendants sold the tug TP 100 to the plaintiffs to be used in plaintiffs' business to the knowledge of the defendants and that defendants at that time warranted the tug to be fit and proper

in all respects for such use. In paragraph IV of the complaint it is alleged that plaintiffs relied on the warranty and attempted to make use of the vessel for the purpose aforesaid but when examination was made of the vessel it was ascertained that the same was not fit for or in a seaworthy condition to perform or engage in the purpose for which the same was purchased by the plaintiffs. In paragraph V of the complaint it is alleged that as soon as the unfitness was ascertained the plaintiffs notified the defendants thereof and of the estimated damages resulting therefrom and set forth with particularity plaintiffs' claim as to the defects in the vessel. Paragraph VII of the complaint alleges that defendants represented and warranted to the plaintiffs that the vessel as sold was in a sound and seaworthy condition with the exception of one scarred crank pin and bruised forefoot for which an allowance of $5000.00 was made by defendants to plaintiffs on the purchase price of the vessel. That the vessel was unseaworthy and unsound and plaintiffs were ignorant of the falsity of the representations and warranties and that plaintiffs relied on such representations and warranties in the purchase of the vessel. In paragraph VIII of the complaint plaintiffs alleged that at the time of the sale of the vessel defendants well knew that the vessel was not seaworthy and sound for the purpose and business in which the plaintiffs were engaged and that by such misrepresentations defendants had induced the plaintiffs to purchase the vessel and that the plaintiffs were misled and injured thereby and that the plaintiffs suffered damages to the amount of $32,000.00.

Defendants in their answer in paragraph IV alleged that they made no warranty concerning the condition of the vessel or of its fitness for any job contemplated by the plaintiffs and alleged that the vessel was sold on an "as is" basis. They further alleged that they had no knowledge concerning plaintiffs' contemplated use of the vessel and that the vessel was sold at a reduced price because of the scarred crank pin and the damaged forefoot and that the vessel was purchased by the plaintiffs after an inspection of the same and with full knowledge on the part of the plaintiffs as to the condition of the vessel and as to its fitness for their operations. In paragraph V of the answer defendants admitted that the vessel when sold had a scarred crank pin and that the forefoot had been damaged and alleged that the plaintiffs had full knowledge of such defects at the time of purchasing the vessel and that the plaintiffs purchased the vessel at a reduced price because of such defects. In paragraph VI of the answer defendants denied all plaintiffs' allegations as to misrepresentation and alleged that if plaintiffs had incurred expenses as alleged in their complaint that such expense was not incurred because of any action of misrepresentation of the defendants. In paragraph VIII of the answer defendants specifically denied that they had made representations to the plaintiffs as to the condition of the vessel or of its fitness for the work contemplated by the plaintiffs and alleged that plaintiffs had a full opportunity to inspect the vessel before purchasing the same and that plaintiffs did inspect the vessel. In paragraph X of the

answer defendants alleged that if in fact plaintiffs were denied the use of the vessel for a period of seventy-five days or for any other period that such loss was not the result of any action of the defendants.

Appellants believe that there are four questions involved in this appeal as follows:

1. Does the record support the findings and conclusions of law of the trial Court to the effect that the appellants made express warranties concerning the condition of the vessel upon which appellees would be entitled to any judgment for damages against the appellants?

2. Does the record support a finding of the Court that any warranties as to the condition of the vessel were breached by appellants?

3. Does the record support the finding of the trial Court that appellees were entitled to any damages against appellants as a result of the alleged warranties and the alleged breach of warranties?

4. If it is found that warranties were made and that those warranties were breached, what damages were suffered by appellees as a direct and proximate result of such warranties and their breach?

By motions for judgment made during the course of the trial and by objections to the introductions of certain evidence and of exclusion of other evidence and by exceptions taken to findings of the Court and the conclusions based thereon, and to the judgment as granted and by motion for new trial or for judg-

ment for the defendants and by motion to amend the findings of facts and conclusions of law as made by the trial Court, the defendants raised all of these questions during the trial of the case.

The contract in question was made in the State of Washington and appellants agree that the law of the State of Washington is the applicable law in determination of this cause as found by the trial Court. Appellants have been unable to determine any substantial difference between the laws of the State of Washington and the laws of the Territory of Alaska in connection with the issues raised by this case. As will appear from the Court's findings as well as from the evidence in the record all parties were residents of the Territory of Alaska and the Territory of Alaska was the forum for trial.

Washington as well as Alaska has adopted the Uniform Sales Act and the provisions of that act apparently were in full force and effect in the State of Washington at the time of making the contract in question.

As previously pointed out the sales contract between the parties concerning the vessel which is the subject of this action was in writing signed by both parties and such agreement was introduced in evidence as plaintiffs' exhibit No. 1 and is found beginning at page 78 of the record. This document says nothing about warranties, express or otherwise. The agreement does state in paragraph 1 thereof that the first parties (appellants here) agree to sell and the second parties (appellees here) agree to purchase

said TP 100 Army Tug and Passenger Boat .... *as presently equipped and where presently located,* at a purchase price of Twenty-Five Thousand Dollars ($25,000.00).

This instrument was drawn by the attorney for the appellees without independent counsel or advice on the part of the appellants and should be construed in case of doubt against the plaintiffs who caused the same to be prepared.

> *White v. Eagleson,* United States Court of Appeals, Ninth Circuit, 193 Fed. 2d 567.

According to appellees, appellants had theretofore on numerous occasions made various oral representations and warranties concerning the vessel in question. According to appellees' attorney, who dictated the instrument in question, in his deposition when called as a witness on behalf of appellees, discussion was had on at least two occasions either while the agreement was being dictated or immediately prior thereto concerning representations. In that connection see record page 409, where such attorney was testifying concerning the conference that immediately preceded dictation of the agreement, to the effect that appellant Jack C. Anderson, Sr., had made a statement that he had a sale of the vessel being negotiated with other parties in Vancouver, British Columbia, and that such parties had thoroughly examined and inspected the vessel and were ready to go ahead at the price for which the vessel had been offered to appellees and that, while in the attorney's office, during that conference appellant Jack C. An-

derson, Sr. had received a telephone call and informed Mr. Owens in the presence of the attorney that the call was in connection with the sale of the vessel to the parties in Vancouver and that such parties were anxious to complete the deal and that if Owens wanted to take the vessel, that he would have to make a firm commitment on it at that time. On page 410 the question was asked of the witness as to whether Owens stated that he was willing to proceed on the basis that was then outlined, and the answer of the witness was that Owens indicated that he was ready to purchase the vessel if the vessel was as indicated and represented by Mr. Anderson. The witness went on then to inquire of Owens as to whether he had thoroughly inspected the vessel or had any competent marine engineer inspect it, and Owens told him that he had not, and then the parties engaged in a side conversation in which Anderson said that the vessel was as represented, and that they could proceed to close the transaction at that time. The witness was then asked as to whether Anderson had made any reference to any previous inspection and the answer was that in the course of the conversation he said that the Canadian parties had made a thorough inspection of the vessel and that the vessel was as Anderson had represented it to Mr. Owens. On cross-examination this witness testified that he had not been informed concerning the nature of the alleged representations, and that no representations were made by Anderson to Owens in his presence as to the condition of the vessel except that Anderson stated the vessel was as represented. The witness

stated that he did not know what the representation was because that was a subject of separate conversations between the parties. On page 420 of the record, the witness Mr. Mills stated that he was retained by Mr. Owens to draw the agreement and was paid by Owens for that service.

American Jurisprudence Volume 20 dealing with the subject of evidence at page 958, Section 1099, uses the following language in setting forth the so-called parole evidence rule:

> "It is a general principle that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing; in other words, the parol agreement is merged in the written agreement and all parol testimony of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent."

Among the cases cited in support of the proposition above set forth are several from the State of Washington, and among others is the case of *Fairbanks Steam Shovel Company v. Holt and Jeffrey,* 140 Pac. 394, to which reference will be made later in this argument. Also under that section is listed a relatively recent case from the State of Utah, *Garrett v. Ellison,* found at 72 Pac. 2d 449, 129 ALR 666 which

stands for the proposition that the parole evidence rule is founded upon the principle that when the parties have discussed and agreed upon their obligations to each other, and reduced those terms to writing, the writing, if clear and unambiguous, furnishes better and more definite evidence of what was undertaken by each party than the memory of man, and applies to exclude extrinsic utterances when it is sought to use those utterances for the purpose for which the writing was made, and has superseded them as the legal act.

In the instant case, all of the evidence concerning the alleged representations and having to do with alleged warranties is parole evidence. Since it is apparent that Plaintiffs' Exhibit 1 was the written evidence of the agreement of the parties concerning the sale of the vessel in question, it would appear that oral conversations leading up to that writing should not be admissible to show an agreement of the parties other than the written agreement. As set forth in the American Jurisprudence citation above "it is conclusively presumed that the entire agreement of the parties, and the extent and manner of their undertaking have been reduced to writing" and that the parole agreement of the parties has been merged in the written agreement.

The trial Court in its opinion apparently attempted to get around the parole evidence rule by using the following language found at page 35 of the record: "The agreement was executed on April 1, but the

agreement not only does not even refer to the condition of the tug, but its purpose apparently was to provide for immediate transfer of possession pending receipt of a bill of sale from the Army which was a pre-requisite to documentation." That language is followed in the findings of the Court in finding number 10 which reads as follows: "A written agreement was executed on April 1, 1947, but the agreement did not refer to the condition of the tug.", and in finding number 11 which reads: "The purpose of the agreement was to provide for immediate transfer of possession of the vessel pending receipt of a bill of sale from the Army, which was a pre-requisite to the documentation."

Appellants submit that Plaintiffs' Exhibit 1 is a complete contract and the only contract between the parties, and that although part of the purpose of the parties was to provide for immediate transfer of possession of the vessel, that that was only one purpose of the agreement and that the primary purpose of the agreement as shown by such agreement was a contract of sale between the parties binding on both of such parties, with the sale to be effected when first parties received a bill of sale to the vessel from the United States Army, and at such time as the vessel might be documented. Since the only language in the agreement which has to do with the condition of the vessel is in paragraph one and above quoted, it appears from the document itself that the parties did not intend any express warranties as to the condition of the vessel.

In that connection, appellants believe that it is evident that had the parties intended to make any express warranties or representations, that certainly appellees' attorney who drew the contract would have seen to it that such warranties were specifically included in the agreement for the protection of his client. Appellants further believe that a fair inference can be drawn from the agreement and from the circumstances surrounding its signing that express warranties as to the conditions of the vessel were not put in the agreement for the sole reason that it was understood by all of the parties that appellants were selling the boat "as is" and that appellants would not have signed the agreement had it contained any warranties whatsoever.

Appellants believe that this inference is strengthened by the fact that appellants had another sale for the vessel, at the same price offered by appellants, made by persons who had made a thorough examination of the boat, and that this situation was known to appellees at the time in question, and that appellees' sole consideration at the time was to tie up the deal with appellants so appellants would not sell the boat to the other parties. Adding to all of these circumstances, the further circumstances that the attorney who drew the agreement in question was acting for and on behalf of the appellees, and that as a matter of law the agreement must be construed against appellees for that reason, it seems absolutely incredible that appellees should now claim

that express warranties were made concerning the condition of the vessel in question.

Irrespective of the parole evidence rule and its effect in this case, appellants believe that on plaintiff's own evidence the record does not support a judgment in favor of the plaintiffs and against the appellants, and that defendants' motion for judgment made at the close of plaintiffs' case should have been granted by the Court, and that this Court should reverse the judgment of the trial Court and dismiss the action.

It should be kept in mind that the alleged misrepresentations or warranties were made in the month of March, 1947. The case was tried in the month of March, 1951, four years later. The only evidence on behalf of the plaintiffs as to the alleged misrepresentations or warranties was given by the plaintiff A. E. Owens and by Howard A. Dent apparently a former business associate of plaintiff A. E. Owens. The evidence of Mr. Dent was given by deposition and as will be pointed out subsequently in this argument, such deposition is open to severe criticism.

The testimony of the plaintiff A. E. Owens concerning the alleged misrepresentations and warranties is extremely brief. It begins at page 73 of the record where Owens testified that he was down at the dock in Ballard with Tom Morgan and that the tug TP 100 was laying there at the dock and that Morgan told him it was for sale and took him and introduced him to Mr. Anderson. The testimony then continues as follows * * * "and then Mr. Anderson and his son

both took me through the boat and specified at that time the only thing that was the matter with the boat was one crank pin to be turned and that the forefoot of the boat had been bruised in striking a log on the way down to Seattle.

"Q. Did he make any other representations to you about the boat at that time?

A. He represented that it was in first class condition with those exceptions.

Q. Did he state anything about whether the boat was leaking or not?

A. He stated that it wasn't leaking, that the boat was tight. There was no evidence in the back part of the boat that it was taking any water.

Q. Was there any discussion of terms?

A. At that particular moment I think not. He stated their price for the boat was *$25,000.00 if we took it as it was there, or they would put it in first class condition for $30,000.00.*

Q. And did he say anything about how much it would cost to put it in first class condition?

A. He said that it wouldn't exceed $5,000.00 to put it in first class condition.

Q. Now did you see Mr. Anderson again?

A. I saw him several different times. I think the next time I saw him I took Mr. Howard Dent down there to look over the boat with the idea of financing it for me, and he made the same representations to Mr. Dent and myself that he had before."

Later in his direct examination the witness Almon E. Owens testified as follows beginning at page 113 of the record:

"Q. In what way, if any, did he misrepresent the vessel to you.

A. He misrepresented the vessel to us in the extent that he told us it would be less than $5,000.00 to put the vessel in first class condition. That was the representation I bought it on."

And on page 114 of the record:

"Q. Now were there misrepresentations in regard to specific things wrong with the boat?

A. That is true.

Q. And in what way were they misrepresented?

A. In regard to the engine, that the only thing the engine needed was one bearing or crankshaft bearing to be re-turned, and that the only thing the bow needed was a smoothing up of the forefoot * * * we purchased the vessel for $25,000.00 with a definite understanding that the repairs would cost less than $5,000.00.

Q. And was there a definite understanding as to what the condition of the vessel was?

A. That is true.

Q. What was the understanding?

A. That it was in first class condition with these two exceptions.

Q. The two exceptions which you previously mentioned?

A. That is correct."

On cross-examination, the same witness testified as follows beginning at page 122 of the record:

"Q. Now, Captain Anderson took you and showed you all over this boat didn't he?

A. That is right.

Q. And the engine plate was off where this particular piston was hung up, wasn't it?

A. That is right.

Q. And Captain Anderson explained to you that he had been running that vessel for a considerable period of time on five cyclinders with this particular connecting rod detached from the crankshaft, did he?

A. That is right.

Q. And now when Mr. Anderson first offered this boat for sale to you, what was the price?

A. $25,000.00 for us to do the repair work as he specified, or he would do the work himself for $30,000.00.

Q. Well, at first he said, 'I will fix the boat up and you can buy it for $30,000.00, or if you want to take it and fix it up it will be $25,000.00', isn't that right?

A. I think that is correct."

The witness was positive whenever asked a question as to whether he had not bought the vessel "as is" but it seems to the writer of this brief that irrespective of his conclusion as to whether he bought the vessel "as is" or not that the only reasonable interpretation of the language used as set forth by the witness was that he did buy the vessel "as is". The only reasonable explanation would seem to be that appellee after examining the boat on numerous occasions as disclosed by the record believed that he could repair the boat under the $5,000.00 differential between the "as is" price and the price if appellants repaired the boat, or that he was getting such a good bargain in the boat at that price that he believed

he could afford to pay whatever might be necessary in repairs in order to secure the boat.

While it is generally true that in the case of conflict of evidence the Appellate Court will not upset a finding made by the trial Court based upon such evidence, appellants believe that appellees' testimony and the interpretation he put on the language which he admits was used by the parties is so vague and uncertain and in fact so preposterous that this Court is entitled to consider as to whether in fact there was any competent evidence that any representations were made by appellants to appellees. Of course appellants take the position that the language used did not amount to representations or warranties in any event.

It is singular how positive the witness A. E. Owens was concerning the so-called representations which were made to him by the appellants and concerning his reliance on those representations and how vague and totally unsatisfactory his evidence was in other respects.

As a sample of the testimony of Mr. Owens, the writer would like to call the attention of the Court to the testimony of that witness on cross-examination commencing at page 125 of the record where Mr. Owens is being asked concerning a conversation he had with Anderson about the Canadian people who wished to buy the boat as follows:

> "Q. Well, I am not talking about what was said to him on the telephone. I am talking about what he said to you. Did he not, while he was

talking on the telephone, turn to you and say, 'Mr. Owens, the Canadian people want to buy this boat now, and, if you want it all right; if you don't, say so,' and did you not at that time say to him, 'allright; it is a deal. I will put the $5,000.00 in the bank for you. Tell them it is sold.'

A. *I would say that my memory is a little hazy as to what transpired at that time.*

Q. All right, if your memory is hazy, we will let it go. Now, did you talk with anyone else in Seattle prior to the time you purchased this vessel, the TP 100, now known as the Adak, about the condition it was in?

A. I don't know that I did.

Q. To refresh your memory, didn't another man attempt to sell you a boat and tell you that he knew the condition of the TP 100 and that the crankshaft was absolutely no good in it and would have to be removed?

A. I have no knowledge of anything of that kind.

Q. You don't have any knowledge of it?

A. No sir * * *

Q. Well, now, did Mr. A. W. Dawe and Mr. Oaksmith talk with you prior to the time you bought the TP 100?

A. No, sir.

Q. Do you deny you had a conservation with them in Seattle?

A. I don't remember that.

Q. Just a minute until I finish the question, sir. Do you deny that you had a conversation with them in Seattle previous to the time you purchased the TP 100 in which they told you that the TP 100 crankshaft was flat and would have

to be removed and the boat was in bad shape and they tried to sell you a boat they had. Do you deny that?

A. I have no knowledge of that at this time.

Q. You mean you can't recall it or you deny it?

A. I can't recall it.

Q. Do you likewise deny that you stated to them, 'Gentlemen it is all a matter of terms with me. I haven't the cash. Therefore, I have to buy the TP 100 because I can buy it on good terms'? Do you deny that conversation?

A. I have no reason to deny it. I don't know that the thing happened at all.

Q. Well, Mr. Owens, there is nothing wrong with your memory that you know of?

A. This was four years ago. Some things I have reason to remember, and others I don't.

Q. Do you mean to tell me that all the expense and difficulty you had with this boat, that you would not remember such a conversation if it took place?

A. I don't remember that it took place."

At page 129 of the record appears the following testimony of the witness A. E. Owens:

"Q. Now, you admitted, however, did you not, Mr. Owens, that you never at any time questioned Captain Anderson as to whether the vessel had ever been out of the water from the time he purchased it?

A. That I don't remember.

Q. Well, now, didn't you know how Jack Anderson purchased that boat?

A. I didn't know at that time.

Q. Well, did you know before you agreed to buy it?

A. No."

The attention of the witness was then called to exhibit one which specifically sets forth that the vessel was purchased from the War Surplus Agency at Fort Richardson, Alaska, and then the question was asked:

"Q. Now, certainly you knew at that time that Captain Anderson had purchased this boat at the Army Surplus at Fort Richardson, didn't you?

A. That is true.

Q. You knew that he didn't even have a bill of sale from Army Surplus when you bought it; isn't that right?

A. I wouldn't say that it was or that it wasn't, I didn't know whether he had a bill of sale or not at that time."

The attention of the witness was then called to paragraph II of exhibit one and on being asked as to whether that refreshed his recollection he said that that was correct.

At page 169 of the record, the following testimony of Owens appears:

"Q. All right. And now, when you testified this morning that he knew you were going to use this vessel in the lumber industry up in Alaska, actually what you told him was that you wanted the boat to go South?

A. I wanted to go down and get a barge down there, that we had bought down there.

Q. Isn't that what you told him?

A. I don't remember what I told him."

In this connection we call the Court's attention to the testimony of two independent witnesses who have no interest whatsoever in the outcome of this case. Gerald Mason Oaksmith was called as witness on behalf of the defendants. His testimony commences at page 272 of the record as follows:

"Q. Were you acquainted with this TP Boat 100?

A. Yes sir.

Q. And did you ever talk to Mr. Owens about the TP 100?

A. Yes sir.

Q. When?

A. In the spring of 1947.

Q. Do you know the approximate month?

A. Approximately in the month of March.

Q. And where did you have this conversation with him?

A. In my automobile in the front of Pan American Airways office on Fourth Avenue, in Seattle, Washington.

Q. Now, would you state what the conversation was and who was present and the approximate time?

A. I had driven my younger brother, Stanley Oaksmith, from Ketchikan, to Pan American Airways Office. * * * My brother went into Pan American Airways office, and he came out with Mr. Owens. He introduced me to Mr. Owens as a logger from Ketchikan, a customer of his Ketchikan Airways flying company, who was looking for a tug boat. Mr. Owens stated that he had been looking at one TP boat in Seattle and was contemplating purchasing it. This TP boat was

the TP 100 owned by Jack Anderson. I told Mr. Owens that this tug had all the indications of having a bent crankshaft, and that before he bought it he should have it very carefully surveyed because of this possible fault. I told him that the tug had burned out a bearing when the Army declared it surplus at Seward. She was tied up with a burned out bearing, and that Jack Anderson bought her knowing that she had a burned out bearing, and put bearings in after that. I further told Mr. Owens that Mr. A. W. Dawe who was sitting in the back seat of my automobile, who was from New Westminister, B. C., and had two tugs on tap of similar design which he wanted to sell. Mr. Owens and Mr. Dawe talked for a few minutes and then Mr. Owens said he was staying at the New Washington Hotel and if Mr. Dawe were going to stay in town that night, he would make reservations for him at the New Washington Hotel so that he could stay at the same hotel. They both decided then to do that and meet later, and what they said from there I don't know. But I told Mr. Owens that the only possible way of telling whether this crankshaft was bent was to put it in a lathe and, that to spend $25,000.00 for this tug, when he could buy another tug of similar design for $35,000.00 without a bum crankshaft, was throwing money away.

Q. Now did you ever have a conversation with him after that?

A. The second time that I saw Mr. Owens was at 740 Westlake North, the Stikine Machine Works in Seattle. At that time Mr. Owens had purchased the TP 100 from Mr. Anderson. I

asked him at the time why, after my telling him of the possible damaged crankshaft, he had bought the vessel. Mr. Owens stated that the terms that Jack Anderson gave him on the tug was the deciding factor in his purchase of that tug and that he didn't have the necessary financing to spend thirty-five or forty thousand dollars on another tug."

The Court will remember that the witness A. E. Owens had already admitted knowing Mr. Oaksmith and on cross-examination had refused to deny that he had had such conversation with Oaksmith but said that he didn't remember whether he had such conversation or not.

On rebuttal at pages 396 and 397 of the record Mr. Owens admitted that he had had a conversation with Mr. Oaksmith at the Pan American Airways office in Seattle and stated that he had not remembered that conversation prior to Mr. Oaksmith's testimony and stated that he did not recall the conversation in question and did not remember the man Dawe although he wouldn't say that he hadn't seen Mr. Dawe.

The witness George Henry Saindon called on behalf of the defendants testified as appears at page 239 of the transcript that he had overheard a conversation between Mr. Owens and Capt. Anderson to the effect that Anderson told Owens about the shaft and that Anderson mentioned about removing the stack and taking the shaft out through the stack and at page 240 of the record the witness testified that in the same conversation between Anderson and Owens

he heard the price spoken of, *"as $25,000 as she sits, as is"*, and Anderson also said that $25,000 as she sits and $30,000 if he fixed it up.

> "Q. If Anderson fixed it up?
>
> A. Yes."

On rebuttal Mr. Owens testified on cross-examination as to that conversation as follows:

> "Q. Now when you were—going back—when you were having your conversation with Mr. Anderson, you heard Mr. Saindon testify that he overheard a portion of that conversation while you were in the engine room. Do you recall Mr. Saindon being there?
>
> A. I don't recall his being there at all.
>
> Q. Could he have been there?
>
> A. That is possible.
>
> Q. Now, Mr. Anderson stated that you agreed to take the vessel as is where is. Was that ever said to you?
>
> A. No Sir.
>
> Q. Any such agreement reached?
>
> A. No Sir."

Being charitable, it appears that Mr. Owens' recollection of the conversations had four years before was not very good.

As the writer understands it, the testimony of Mr. Dent, having been given by deposition, this Court can consider such testimony as though it were being considered for the first time by this Court. That testimony too leaves considerable to be desired. In answer to the seventh interrogatory on the first dep-

osition the witness stated the conversation took place on the date mentioned and as they were interested in disposing of the boat and Owens needed it for his logging business he was endeavoring to buy the boat, and in going over it he was advised that it had just returned from Alaska and was in good shape except that they had hit a *log or rock* and that it might need some minor repair and while the engine did not run Anderson advised us that with the exception of one bearing the engine was in first class shape and that for the sum of not to exceed $5000 the boat could be put in first class condition.

After the trial a second deposition was taken from the witness Dent and in order to refresh his memory as to what took place, he was asked concerning a certain letter he had written on March 12, 1949, to Mr. Orville H. Mills, attorney for Owens. On the face of that letter it appears that it was written as a result of a letter just previously received from Mr. Owens concerning the deposition and concerning the purchase of the boat. What was in the letter from Owens we do not know but in view of the fact that the letter written by Dent uses almost exactly the same words as were used by Owens in his testimony we believe it is a fair inference that Owens in his letter to Dent had attempted to refresh Dent's memory as to what he thought had happened at the time in question. It is particularly interesting that in that letter, written some two years after the supposed conversations and some two years before Dent's testimony on the first deposition, Dent claimed that

appellants had said that the vessel in question had hit a log. In Dent's first deposition he stated that the appellants in that conversation had stated that they had hit a *"log or rock"*. Since it is admitted all the way around that what actually was hit was a rock it seems quite likely that Dent's remembrance in his first deposition was better than his remembrance at the time he wrote the letter immediately after receiving a letter from the plaintiffs but in any event on the second deposition Dent claimed that now his memory had been refreshed by reason of reading the letter he had written two years before and accordingly on his second deposition the witness stated positively that Mr. Anderson had stated that the object struck was "a log".

We think it self evident that Mr. Dent had no independent recollection whatsoever as to what conversation took place between plaintiffs and defendants.

Remington's Revised Statutes of Washington, 5836-12, being a part of the Uniform Sales Act adopted by the State of Washington, defines express warranty as follows:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

The case of *Getty, et al. v. Jett Ross Mines, Inc.*, 159 Pac. (2d) 379, was decided by the Supreme Court of Washington in the year 1945. That case was tried on the theory of alleged fraudulent misrepresentations, and for damages for alleged misrepresentation or breach of warranty. That case is very similar in many respects to the case here under consideration. The defendant in that case was the owner of a certain dragline which had been used for several years and placed in storage needing repairs. Plaintiffs purchased the machine in question for the sum of eight thousand dollars, three thousand dollars down and one thousand dollars per month. The plaintiffs made some of the monthly payments and then defaulted. When the machine was repossessed on behalf of the owners, plaintiffs sued for damages for alleged misrepresentation. Plaintiffs' complaint contains allegations as to misrepresentations, as to the falsity of the representations, as to reliance of the plaintiffs upon the representations and as to plaintiffs' alleged damage which are strikingly similar to the complaint in the instant case. The suit was tried to the Court without a jury and findings of fact and conclusions of law and judgment were entered in favor of the plaintiffs and against the defendant for some $3000.00 in damages together with costs and subject to a credit in favor of the defendant for the balance still due on account of the purchase price. The seller in that case, as in this, had made motions to dismiss and for judgment at the close of the plaintiffs' case and took exception to the findings and to the conclusions and

the judgment of the trial Court and the refusal of the trial Court to grant judgment in favor of the sellers in accordance with the prayer of the cross-complaint. In that case, as in the case here, there were certain obvious defects in the machine which were pointed out to the prospective purchaser. Apparently there were other defects in the machine which were not known to either of the parties similar to what is claimed in the instant case. At the time the buyers first saw the machine apparently the motor was partly disassembled. At the time of the trial respondents claimed that Mr. Ross for the owners of the machine in the month of May, 1942 stated to them that he had completed repairing the motor and that they informed him that at that time the dragline was to be used by a construction company in constructing a war plant. One of the witnesses for the buyers testified that Mr. Ross had said that the machine was in A-1 condition with two exceptions: the motor needed repair, and the drive sprocket was worn and needed rebuilding. This witness said that on another occasion that Ross had told him that the machine was in good shape. Another of the buyers testified that Mr. Ross said "it was a pretty fair old machine." Another witness called on behalf of the buyers said that Ross had said that he thought the dragline used as a crane "would work out pretty good". The Court in summarizing the case used the following language:

> "Mr. Ross stated that the machine was for sale and that the price was $8,000.00 net; but it does not appear that he made any special effort to find

a purchaser other than to permit Mr. Rowe, Mr. Field and respondents to inspect the machine. Apparently respondents sought Mr. Ross in connection with the prospective purchase. When Mr. Field examined the machine, it appears that he was permitted to make any investigation concerning its condition that he desired and that under existing conditions it was possible for him to make. Mr. Field and respondents testified that Ross stated that subject to repairs to the motor the dragline was a fairly good machine, capable of operating two or three months without need for major repairs. During the month of May, Ross informed respondents that the repairs to the motor had been completed. Thereafter the dragline was in storage for over a month, so far as it appears, subject to examination by respondents. Mr. Ross had taken the motor down for the purpose of repairing it for his own use prior to the time Mr. Field and respondents saw the dragline. Mr. Field made it clear that, if he decided to use the machine, he would desire to place it in operation before making his final decision. When Mr. Field decided not to use the machine, naturally he did not attempt to operate it. Respondents undoubtedly knew all that Mr. Field knew concerning the dragline * * *"

At page 385 the Court uses the following language:

"When coupled with the undisputed evidence concerning the conduct of respondents after their purchase of the machine the entire record convinces us that respondents received the machine in just about the condition they anticipated. They knew they were buying a second hand dragline

which had been much used. It clearly appears from the record that such machines were in great demand."

Again at page 386 the Court uses the following language:

"While it does not appear that any agent of appellant ever suggested to respondents that they test the dragline by operating it, the record discloses no request by respondents that they be permitted to so test the machine. Apparently respondents never examined the dragline save and except as above set forth, though they had every opportunity to do so. At least some of the statements made by Ross, and upon which respondents rely as warranties, fall within the class of estimates or 'sellers praise' and do not fall within the classifications of statements upon which the buyer of second hand machine may rely without investigation.

"Respondents knew of course that the dragline had been used and was definitely second hand. Their attention had been called by Mr. Field to the fact that certain portions which he named were only 50% efficient, and he estimated the machine as a whole (with the motor repaired) as no more than 65% efficient. That was the machine for which respondents offered to pay two-thirds, or a little less, of its cost new. Such machines were in great demand. This one was rented for over $800.00 per month."

At page 388 the Court uses the following language:

"In the case at bar, the dragline was shown in the open, under no camouflage whatsoever. Re-

> spondents and Mr. Field made every examination thereof that they could make. Respondents knew that they were buying a second hand dragline, although the purchase was not completed for many weeks after examination by Mr. Field.
>
> The burden of proof rested upon respondents to prove the allegations contained in their amended complaint. We are convinced that they did not meet that burden. The Court has given due weight to those findings of the trial Court which are based upon disputed testimony.
>
> We hold that the evidence preponderates against the findings."

The Court then reversed the judgment of the trial Court with instructions to enter judgment in favor of the seller appellant.

In the instant case, assuming for the purpose of argument that representations were made as claimed by appellees it seems clear that such representations at best were statements of opinion or of value and were at most "seller's praise". The defects in the vessel upon which the trial Court granted damages in favor of appellees and against appellants were the very defects pointed out to the buyers by the sellers and while it is probable that neither of the parties knew the extent of those defects still the buyer certainly knew of such defects and had information from what he was told by the appellants as well as from his own personal observation so that if he wasn't satisfied he should have made further investigation.

Appellee's continued assertion that he relied solely upon the representations which he claims the appellants made is absolutely incredible especially in view of the testimony from the independent witnesses to the effect that he had been warned of probable further damage and in fact according to one witness had discussed the probable further damage with appellant Jack C. Anderson, Sr.

From the whole record appellees were not entitled to rely upon the alleged warranties and in fact did not rely upon the same. The only reasonable conclusion is that appellees thought they were getting a bargain and acted accordingly with their eyes wide open. In that connection and in conjunction with another phase of the Washington case just cited, it is interesting to note that plaintiffs knew everything about the tug TP 100 as early as somewhere between the middle of April and the end of April, 1947, that they knew at the time of the trial. According to the testimony of the witness A. E. Owens, prior to the time that his memory was supposedly refreshed by showing him a letter from his attorney, the transfer of the vessel took place on the 20th of May, 1947 and until that time he had paid no money whatsoever in the purchase of the vessel. At that time he could no doubt have rescinded his agreement if warranties had been made and breached but he didn't want to rescind the purchase. In fact A. E. Owens testified that he had spent nothing except $300.00 before he discovered the extensive damage to the engine which he claims existed and when asked why he didn't

rescind the sale at the time he said that he didn't rescind it because he wanted the boat. See R 152 and R 155. After discovering the supposed damage appellee went right ahead overhauling the motor and completely refurbishing and rehabilitating the vessel, and then attempted in effect to secure the vessel for nothing by making a claim for damages, in an amount greater than the purchase price, for alleged breach of warranties. Appellants feel that that is not the law and that the judgment of the lower Court should be reversed and the case dismissed.

Appellants desire to call the attention of the Court to the case of *Smith v. Bolster,* 125 Pac. 1022 and the case of *Lent v. McIntosh,* 186 Pac. (2d) 626, both decided by the Supreme Court of Washington.

In the first of such cases the seller apparently represented that the automobile in question was "in first class condition as good as any new car" and that it would average 11 miles to a gallon of gasoline. The Court held that in view of the fact that the price paid was considerably under the price of a new car that the expressions used were nothing more than the expression of an opinion as to the car's condition or what the law sometimes terms "seller's praise" and in reversing the judgment said:

> "We are of the opinion that there was neither warranty nor breach and that the judgment of the lower Court in so holding is error."

In the *McIntosh* case, above cited, as in the case at bar, apparently the seller made an estimate of

the cost of making the repairs. The Court in its opinion at page 631 uses the following language:

> "There is no testimony tending to show that McIntosh actually knew of the condition of the cylinder walls and the transmission case, of which respondent now complains, and respondent does not claim that appellant knew of these defects, but his argument is to the effect that appellant should have known or that appellant is liable under the following rule:
>
> > 'If a person states as true material facts susceptible of knowledge to one who relies and acts thereon to his injury, if the representations are false, it is immaterial if he did not know they were false, or that he believed them to be true.' * * *
>
> There is no testimony that Mr. McIntosh was ever asked anything about the transmission case or the drive case assuming that they are the same and that the court was referring to the crack found in the transmission case, until after the sale was completed, * * *
>
> While, as stated, appellant told respondent that he had repaired many parts of the machine to the extent of $1000.00, and had put on a new bull dozer attachment, there is no testimony to indicate that appellant knew of the condition which respondent claims he found in the cylinder walls and the transmission case, or that appellant had trouble with those particular parts.
>
> There is no question but that respondent had trouble with the machine practically from the time he started to operate it, and the testimony shows that he expended considerable money in

> repairing various parts of the machine, but again we state that the testimony shows the machine bore the evidence of having had considerable use, and Peterson, at least, from his experience, must have known that such machine, from the very nature of the work in which they are engaged, got a great deal of hard usage. * * *
>
> Assuming only for the purpose of argument that there was some testimony to support the finding that appellant represented the machine to be in good merchantable and operating condition, it is our opinion that this statement did not constitute such a fraudulent representation as to warrant a recovery in this case."

Appellants submit that the evidence before the Court does not support the finding of the trial Court that the vessel was warranted by appellants or that any warranties were made such as to induce the plaintiffs to purchase the vessel in reliance thereon or that the plaintiffs purchased the vessel in reliance on any warranties made by defendants or the conclusions of the Court that it was the intention of the defendants that the plaintiffs should rely on any warranties. On the contrary the evidence justified the inference that the vessel was sold without any warranties whatsoever on an "as is where is" basis and plaintiffs bought exactly what they thought they were buying. The testimony of the witness Oaksmith was never denied and stands undisputed on the record. From that testimony it appears that plaintiff A. E. Owens knew that he could buy a similar boat for the sum of $35,000 "without a bum crankshaft". (R 273.)

Both Mr. Owens and his witness Dent testified that appellants represented that the vessel could be put in first class condition for $5000. We submit that even using the language between the parties as testified to by plaintiff and his witness, the best that could be said of such language from the standpoint of plaintiff was that Anderson said that he would put the boat in first class condition and deliver it to plaintiff for $30,000.00. It was never intimated anywhere that defendant intended to guarantee that plaintiff would not have to expend more than $5000 to put the vessel in first class condition.

Incidentally it seems clear from the testimony of all parties herein that there was never any intention on the part of the sellers to sell the vessel for any other price than $25,000 as it was or $30,000 if they put it in shape, nor is there any evidence whatsoever to show that defendants intended to warrant anything concerning the boat. Since they had a purchaser who was very much interested in purchasing the vessel for $25,000, as it was, after making a thorough survey and inspection of the vessel, it seems incredible that it could be claimed that they intended to sell the vessel to the plaintiffs for $25,000 guaranteeing that they would pay all expenses of repair over and above $5000.

Incidentally there is no evidence whatsoever that the vessel could not have been satisfactorily operated after repairs amounting to not more than $5000. The vessel had operated satisfactorily during the previous year and up until the time it reached Seattle. Plain-

tiffs never tried to operate the vessel at all. Instead, after doing part of the work to correct the obvious defects which had been pointed out to them, they decided to overhaul the entire motor. While it may be true that the motor was in bad shape from a mechanic's standpoint as testified by Mr. Engstrom there is no testimony at all that the motor would not have continued to operate satisfactorily in the future as it had operated in the past after the one crank pin had been smoothed up and the bow repaired. Certainly it was never contemplated by any of the parties that plaintiffs would proceed to completely overhaul the motor and completely overhaul the rest of the boat and charge it to the defendants as was done in this case.

Remington's Revised Statutes of Washington 5836-69 has to do with the remedies of a buyer for breach of warranty and reads in part as follows:

> "(1) Where there is a breach of warranty by the seller, the buyer may, at his election,
>
> > subsection (b) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.
>
> (2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.
>
> (6) Measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
>
> (7) In the case of breach of warranty of quality, such loss, in the absence of special circum-

> stances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Remington's Revised Statutes of Washington, Section 5836-49, reads as follows:

> "In the absence of express or implied agreement of the parties acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale but, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

In this case the buyer took possession of the boat on or about April 2, 1947. A machinist "turned the defective crankshaft within a few days after that date and somewhere between the 15th of April and the 29th of April the plaintiffs knew or should have known the full extent of the claimed damage to the motor and the claimed breach of warranties concerning such motor. Within a few days thereafter they caused the vessel to be put in drydock and certainly at that time they knew the full extent of the damage to the hull. It is almost a certainty that they knew the damage to the hull or had a very good reason to suspect the nature of the damage to the hull before putting the vessel in drydock.

Plaintiffs have claimed that the vessel was warranted to be sound and tight. As a matter of fact everybody knew that it was not sound and tight insofar as the bow was concerned. The damage there was specifically called to the buyer's attention and while it is probable that no one at that time knew the exact extent of the damage all the parties suspected that it would take several thousand dollars to repair that damage. This is borne out by the testimony that Anderson had already had an estimate of $5,000.00 for putting the vessel in running order and that that figure was used in discussing the difference between the price of the sale as the boat stood or the price of the vessel if Anderson caused it to be repaired. Also it appears that anyone making any inspection could see that the bow was splintered under water. While the plaintiff insists that he did not see the damage and that he relied implicitly upon the so-called representations made by the defendants his witness Blanchard admits that he could see the splinters and at least some damage below the water line and defendants' witness Engstrom testified that he personally could see that there was considerable damage below the water line and suggested that an inspection be made of that damage. While there is some testimony that the vessel was taking water in the forward chain locker ahead of the water tight compartment there is no evidence at all that any of that water ever got behind the water tight compartment or that the damage could no have been reasonably repaired within the estimate of $5,000.00. In that connection we should keep in mind that the work

contemplated by the parties to be done to the motor as claimed by appellees amounted to only $300.00 and the bulk of the repairs if defendants had made the repairs would have been to the bow.

Exhibit 13 purports to be a bill rendered by Pacific Electrical and Mechanical Co. for the work done to the hull of the tug in question. This bill states as follows: "To bill you for repairs to the tug Adak (Helen A.). Clean and copper paint bottom. Repair forefoot, stem and keel, renew planks. Do other work as directed." Then follows an itemization of bill for $8,620.43 including a list of miscellaneous material apparently used in repairing the vessel. How much of the bill was used in cleaning and copper painting the bottom of the boat and how much was used in renewing planks in other parts of the vessel not in the bow and how much was used in "doing other work as directed" is left purely to speculation.

In any event from the undisputed evidence defendants remained in Seattle until the 3rd of June of 1947 and apparently their power barge remained tied up at the same dock where plaintiffs took delivery on the tug which is here in question. Apparently had plaintiffs desired to do so there would have been no difficulty whatsoever in contacting the defendants but no such contact was made. Plaintiff proceeded to overhaul the motor and generally to overhaul the hull according to his own inclinations without any notice to the defendants at all and without any attempt to contact them until the letter dated May 17, 1947, written by plaintiffs' attorneys and directed to

appellants. That letter written at least a month after plaintiffs knew or should have known of the alleged breaches of warranty was obviously written for the express purpose of attempting to set up a suit for damages and at the time the letter was written plaintiff without consultations with or notice to the defendants had obligated himself to pay some $20,000.00 to $25,000.00 in connection with the repair and rebuilding of the vessel.

It seems obvious to appellants that the whole purpose of this thing was to purchase a known used boat in damaged condition at the lowest possible price then to proceed to repair the vessel and to completely overhaul the same and then to attempt to get out of paying the price or to recoup the price paid by claiming misrepresentation and breach of warranties without giving the defendants an opportunity to take back the vessel and to sell it as they could have done had they known that plaintiff did not intend to go through with the deal that he had made.

See *Perrine v. Buck,* 156 Pac. 20.

All the way through their case plaintiffs have apparently taken the position that the correct measure of damages in the event of breach of warranty is the amount of money expended by plaintiffs in rehabilitating the vessel. Accordingly they confined their proof on the trial to showing the amounts allegedly paid by plaintiffs in that connection. They did not offer any evidence whatsoever concerning the value of the vessel in its condition as purchased as against the value of the vessel had it been as they claim it

was represented. They are attempting to charge defendants here on the basis of a vessel completely overhauled and in first class condition by charging the defendants with all the costs of overhaul, repair and rehabilitation.

Under the Uniform Sales Law as adopted by the State of Washington, Section 5836-69, as above set forth, the proper measure of damages in case of a breach of warranty of quality is the difference between the value of the goods at time of the delivery to buyer and the value they would have had had they answered to the warranty. The case of *Burnley v. Shinn* decided by the Supreme Court of Washington found at 141 Pac. at page 326, stands for the proposition that in an action for breach of warranty of an automobile no judgment for damages can be rendered without evidence of the market or reasonable value of the machine in contradistinction to the sale price.

See also the following cases:

Abrahamson v. Cummings, 117 Pac. 709, decided by the Supreme Court of the State of Washington;

Fryburg v. Brinck, 12 Pac. (2d) 757, decided by the Supreme Court of the State of Montana;

In re Buswell's Estate, 22 Pac. (2d) 317, decided by the Supreme Court of the State of Oregon; and

Denver Horse Importing Co. v. Schaefer, 147 Pac. 367, decided by the Supreme Court of the State of Colorado,

to the effect that the correct measure of damages for alleged breach of warranty is the difference between the value of the goods as furnished and the value of such goods had they been as warranted.

See also the case of *Fairbanks Steam Shovel v. Holt and Jeffrey,* decided by the Supreme Court of Washington, 140 Pac. 394. That case involved a claim for damages as a result of the breaking of a boom on a dredge. The plaintiffs in that case claimed damages in the amount of the value of the claimed repair of the boom and the trial Court allowed an arbitrary amount less than the cost of repairing the boom and that judgment was affirmed by the Appellate Court. In that case the Court had found that the appellants as sellers had specifically undertaken and guaranteed to put the dredge in a first class condition and held that under such guarantee that the seller was liable for damages for the defective boom even though it had no knowledge of such defective boom. The Court held that the amount paid out in repair does not itself furnish a measure of recovery, citing cases, and held that it was not satisfied that the amount of repairs was a reasonable sum to be charged and adopted the arbitrary finding of the trial judge as to the damages suffered by reason of the breach of warranty.

The Court in its opinion at page 38 of the record quotes sub-section 7 of Section 5836-69 of Remington's Revised Statutes of Washington above mentioned to the effect that the measures of damages to be used in cases of breach of warranty of quality are the differences in value between the goods at the time

of delivery and the value they would have had if they had answered to the warranty, and at page 38 of the record the Court used the following language:

> "Since the defendants sold the tug for $25,000.00 and the plaintiff claims it cost $27,487.97 to restore the vessel to the condition it was warranted to be in, it would appear either that the defendants sold the tug for far less than its value or that the plaintiff had it completely overhauled. I am inclined to believe that much of the work was unnecessary to restore the vessel to the condition it was warranted to be in, for it is incredible that the value of a tug which cost $250,000.00 to build three years before had, because of a ruined motor and damaged bow, wear and tear and perhaps neglect, somehow depreciated to a minus $2,500.00."

Later in the opinion at page 40 of the record appears the following language:

> "I am inclined to believe that from the amount allowed for repairs should be deducted the equivalent of accrued depreciation for three years, the age of the tug, but in the absence of any evidence, no finding can be made on the subject."

From this language it is evident that the Court got into difficulties in attempting to assess damages according to plaintiffs' theory and according to plaintiffs' evidence which was voluminous as to the amount expended supposedly in repairing the vessel, but absolutely silent as to the value of the vessel as it was delivered in contradistinction to the value of the vessel had it been as plaintiffs claimed it was warranted.

Had the correct measure of damages been proved, the Court would not have been bothered either with a belief that much of the repair was unnecessary or with any question of three years' accrued depreciation because both of such matters would have been taken care of by testimony as to the value of the vessel at the time it was sold as against the value of the vessel had it been in the condition which plaintiffs claim it was warranted to be.

It appears to us that if it was evident that the tug had not depreciated to a minus $2500 in value in three years that it is just as evident that it had not depreciated to the extent found by the Court.

The difficulty with plaintiffs' proof and the Court's findings is that the repairs necessarily resulted in a rebuilt or reconditioned vessel which was without question far more valuable than the vessel as it was sold.

Certainly it can't be said from the evidence in this case that the parties contemplated that plaintiffs were to receive a completely overhauled and reconditioned boat with a rebuilt motor for the price of $25,000 plus five thousand dollars in repairs.

Appellants believe that from the foregoing argument it is apparent that no warranties were made and no warranties were breached and that plaintiffs have not shown that they were entitled to any damages at all. However, in the event that the Court should hold that appellants are wrong in their contention, then appellants allege that the only damages

which appellees have proved they suffered as a result of the alleged breach of warranty is the difference between five thousand dollars and the cost of repairing the bow of the boat or approximately three thousand to thirty-five hundred dollars.

Appellants believe that on the state of the record it would be absolutely impossible to find the true cost of such increased repairs by reason of the fact that appellees admittedly did considerable work which was not caused by the alleged breach of warranty. The trial Court attempted to get at this matter by estimating the cost of materials as to cost of labor and deducting the resulting estimate as the cost of copper painting the bottom of the boat which admittedly was not contemplated by the parties. This finding is not based upon any evidence whatsoever and is completely without value for the reason that it fails to take into consideration the fact that there is no evidence to support the inference that copper painting was the only extra work done by appellees in repairing and refurbishing the hull of the boat. On the contrary, it appears clear that the boat was thoroughly cleaned, which probably included removal of barnacles and possibly sandblasting and other work preparatory to painting. It also ignores the fact that the bill is for "other work as directed" and there is no evidence at all to indicate the extent of such other work. There is no evidence whatsoever that the work in repairing the hull over and above the work done in fixing up the bow was of the value set by the Court. Such value is pure speculation.

The same may be said concerning the value of the lifeboat as found by the Court. Appellees in their complaint claim that the lifeboat in question was worth $1000, but unless appellants have overlooked something in the record there is no evidence whatsoever concerning the value of the lifeboat except the testimony of appellants' witnesses to the effect that such lifeboats were selling in Seattle for approximately $300 to $400. The Court arbitrarily allowed the sum of $500 for the value of this lifeboat.

During the course of the examination of Mr. Owens, defendants asked him what he received upon resale of the vessel in question and on objection by Owens' attorney the Court refused to allow him to answer that question on the ground that the sale was too remote to have any bearing upon damages in the case. The question asked of Owens was as to whether he had not sold the boat for $65,000 in the year 1950. If in fact he did sell the boat for $65,000 then it appears that he received back the original cost of the boat, all repairs which he made to the boat, damages for loss of profits allowed by the Court plus a profit of some $6000. In addition he had the use of this valuable boat, which appellees claim would earn about $125 a day net, for a period of some three and one-half years. If the vessel was sold for $65,000 it appears clear that the plaintiffs suffered no damages whatsoever and to allow them damages in the sum of 24,970-odd dollars plus costs or in any other sum cannot be justified.

The Court allowed plaintiffs as damages, the sum of $7920.18 because of alleged loss of profits by reason of delay in use of the boat occasioned by the alleged misrepresentations and breaches of warranty. This allegation of damages is based strictly upon a statement of appellee Owens to the effect that had he had the use of the boat he could have hauled some five million feet of logs at a gross price of $4 per thousand and that his net profit would have been one-half of that amount, or $2 per thousand. No testimony was offered or received at all concerning any breakdown of how such profits could be realized. In fact the testimony was that the tug could have hauled a large portion of such logs, not that it could have hauled all of them. Appellants believe that such testimony was strictly speculation and not the basis for any claim of damages. It seems absolutely unbelievable that a vessel which cost $25,000 and which plaintiffs claim was to be repaired at a cost of not to exceed $5000 could earn a net profit of almost $8000 in a period of sixty-four days, almost $125 per day, day in and day out. At that rate the boat would completely pay for itself including the estimated cost of repair of $5000 in approximately eight months' time.

The Courts of the State of Washington have considered this matter of speculative profits and we wish to call the Court's attention to the case of *Puget Sound Iron and Steel Works v. Clemmons,* 72 Pac. 465. In that case a logging company purchased a donkey engine and then claimed loss of profits because it was claimed there was a breach of warranty

concerning such engine. The lower Court allowed loss of profits as an element of damages. The Appellate Court in reversing the lower Court and in disallowing the speculative loss of profits as an element of damage used the following language:

> "There is no evidence at all in the record tending to show that appellants knew the extent of respondent's operations, the number of logs he was hauling, the number of men or machines he was working or the kind or character of roads the logs were hauled over. These things would certainly have been mentioned at the time of the contract if appellant intended to give a warranty that the engine would do the work which appellant was going to put it to, and in case of failure to be liable for the loss of profits of a large logging camp."

In the case in question there is some evidence that appellee Owens notified appellants that he was operating a logging camp and intended to use the tug in connection with those operations but there is no evidence at all that appellants knew the extent of his operations or anything else about such operations or even that the tug in question was to be used in hauling logs. It seems clear that appellants did not contemplate that they were to be liable in any event for any loss of profits of a large logging operation.

See also *Perrine v. Buck,* 156 Pac. 20, in which the buyers ordered a part for a pump for use in connection with their road building operations in the City of Seattle. The trial Court allowed a judgment for loss of profits. The Appellate Court reversed the

judgment with directions to enter judgment in favor of the plaintiff, who was the seller in that case.

Appellants believe that they have shown that no warranties were made, no warranties were breached and that in any event no damages were proved by appellees and that the trial Court should have rendered judgment for defendants at the close of plaintiffs' case. In the alternative we believe that we have shown that if the Court finds that appellants are liable to appellees in any amount that the judgment as rendered is grossly above any amount to which plaintiffs could possibly be entitled and that in that event the matter should be sent back for a new trial under proper evidence as to measure of damages and that the items for loss of alleged profits should be stricken from the case.

Dated, Anchorage, Alaska,
September 26, 1952.

Respectfully submitted,
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